In the Supreme Court of the United States.

OCTOBER TERM, 1903.

FRED L. DORR AND EDWARD F. O'BRIEN, plaintiffs in error, v. THE UNITED STATES. } No. 583.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a libel suit brought at the instance of Don Benito Legarda, a member of the United States Philippine Commission, against Fred L. Dorr and Edward F. O'Brien, proprietor and editor respectively of the Manila Freedom, a daily newspaper which was, until recently, published and circulated in the city of Manila, Philippine Islands.

This suit grew out of an episode in the trial of another libel suit in which said Benito Legarda was the prosecuting witness and Vicente G. Valdés, editor of a Spanish newspaper published in the city of Manila, known as the "Miau," was

the defendant. Valdés was represented by the firm of Montagne & Dominguez, who had associated with them an elderly gentleman named Edwin H. Lamme, who, at one time, had practiced law in the United States, but who had not been able to gain admission to the bar of the Philippine Island.

This prosecution, and another similar one in which a commissioner also was involved, called forth loud and vigorous criticism from the American newspapers in Manila and from the American portion of the community generally, because according to the old Spanish law, under which Valdés was being prosecuted, the truth could not be offered as a defense in a prosecution for libel. This law was well known to counsel for Valdés, to Mr. Lamme, to the Hon. Arthur F. Odlin, the presiding judge, and to plaintiffs in error.

Notwithstanding his knowledge of this law, Mr. Lamme arose in court during the progress of the trial and asked to be permitted to read what he termed an "offer to prove," in which he stated that he stood ready to prove all the allegations with reference to said Legarda which had been published in the "Miau." This was objected to by counsel for the prosecution, but the objection was overruled, and Mr. Lamme was allowed by the court to publish the damaging statements complained of by reading them in open court and by handing copies of them to the clerk of the court and to the representatives of the press. The

statement had been carefully prepared, committed to writing, and translated into Spanish. Apparently it was injected into the trial of the case for the sole purpose of enabling the newspapers to publish it and claim immunity from prosecution for such publication on the ground that it was privileged.

The plaintiffs in error, who had criticised the Spanish law rule making truth no defense in a prosecution for libel, and who were known to be opposed to the prosecution of Valdés under such a law, eagerly seized the opportunity to republish the libel for which Valdés was being prosecuted, and gave great prominence to it by publishing it under sensational headlines which were set out in large, black-faced display type, extending across half the front page of the paper. The form in which Mr. Lamme had restated the original publication, in his so-called "offer to prove," was much more elaborate and more damaging in every respect than the original libel.

The headlines and the article in full are as follows:

TRAITOR, SEDUCER, AND PERJURER.

SENSATIONAL ALLEGATIONS AGAINST COMMISSIONER LEGARDA.

MADE OF RECORD AND READ IN ENGLISH—SPANISH READING WAIVED.

Wife would have killed him.

Legarda pale and nervous.

The Legarda-Valdez libel case was called in the court of first instance yesterday

morning at 9 o'clock, pursuant to adjournment the day before.

As some of the testimony presented by the prosecution had alleged that Senor Valdez spoke English and knew that Senor Fergusson had introduced him to Commissioner Moses as the editor of "Miau," Attorney Dominguez went on the stand as a witness for the defense. He stated to the court that though he was Senor Valdez's attorney he was not aware that his client spoke more than a few words of the English language. He said that if he was introduced to a man, he knew from the gestures made that he was being introduced and could acknowledge it. Sheriff Peterson also was a witness for the defense along the same lines. His testimony corroborated that of Mr. Dominguez. A recess of a few minutes was then declared while Commissioner Legarda, who had been sent for, appeared in the court room.

When Senor Legarda finally appeared, he took his seat alongside his counsel, Attorney Calderon. He was somewhat pale and appeared slightly nervous. He went to the stand and took his seat in the witness chair. Judge Lamme, for the defense, then arose to interrogate him. The first question asked was:

Q. What is your name?

A. Benito Legarda.

Q. Where do you live?

A. 195 Calle San Sebastian.

Q. Where were you residing in March and April, 1898?

The prosecution at once put in an objection to the question, which objection was upheld by his honor. Judge Lamme then changed the question somewhat, and asked:

Q. Were you a commissioner during August and September, 1901?

A. Yes; from September the first.

Q. Where did you reside during March and April, 1898?

The prosecution again objected to the question. His honor asked Judge Lamme if he desired to argue the question. Judge Lamme explained that he did not; that he was only leading up to what he desired to get at; that he fully agreed with the judge in his ruling the question out.

Q. Do you know anything of the government known as the Malolos government? was the next question asked.

Again this question was objected to by the prosecution. Judge Lamme then stated that he only wanted to have the questions appear on the records of the court; that the defendant could, and was willing to prove the charge made against the prosecuting witness. He stated that he had drawn up a list of the allegations which were contained in "Miau," and with the court's permission would read them. The prosecution objected, as they were in the English language. Judge Lamme then stated that Mr. Montagne also had a duplicate set of the allegations, written in Spanish, which he would read for

the benefit of the prosecution after he, Judge Lamme, had finished those in English. Judge Odlin gave his consent, and the following was read:

The defendant, not admitting that he was either the author, publisher, printer, or proprietor of the paper in which the article complained of was published, now offers to prove and show the truth of all the allegations set forth in said article, and more particularly the following facts:

1. That Benito Legarda, the complaining witness, is a native of the Philippine Islands.

2. That the said Legarda was, at the time of the publication of said article, and still is, a member of the United States Philippine Commission, one of the highest, most important, and responsible positions in the Government of the United States in the Philippine Islands.

3. That at the time of the marriage of said Legarda his wife was a widow and the mother of a daughter of about — years of age, named Dona Teresa Tuason; that said Dona Teresa was taken into the family of said Legarda, as a member of such family, and said Legarda in all things owed to her the same care and protection as to one of his own children, but that when the said Dona Teresa arrived at the age of about 20 years, the said Legarda seduced the said Dona Teresa, and upon the facts becoming known to his wife, she, the said wife, became so enraged at the lewd, lascivious, and

licentious conduct of her husband, the said Legarda, that she made a desperate but futile attempt upon his life.

4. That at about the time of the outbreak of war between the United States and Spain the said Legarda made loud and boisterous protestations of his loyalty to the Spanish Government and joined and became an officer of a company of volunteer soldiers, and as such an officer took an oath of allegiance to the Spanish Government, whereby he solemnly swore to protect and defend the said Government against all its enemies, foreign and domestic. That afterwards the said Legarda deserted the said volunteers and joined the insurgents, the enemies of Spain, thereby, on account of said oath of allegiance, adding the crime of perjury to the dual crime of treason and treachery.

5. That there was a government organized at Malolos in opposition to the duly constituted authorities of the Philippine Islands and said Legarda fled to Malolos, the capital of the said government; but the conservative influence of MacArthur's guns calmed his martial spirit, and he abandoned the sword and became a financier instead of a cavalier.

6. That the said Legarda became the secretary of finance of the said Malolos government, in opposition to the duly constituted authorities of said Philippine Islands, and became a prominent, active, and malignant enemy of the United States.

7. That the advance of the American arms having shown that America would be successful in the conflict, thereupon the said Legarda, instead of remaining loyal to the Malolos government, fled to the American lines and performed such acts of treachery while acting in the official position above mentioned as to procure a sentence of condemnation by the said Malolos government upon him for treason.

8. That the said Legarda voluntarily took the oath of allegiance to three separate, distinct and hostile governments within the period of eighteen months, and each of which governments, at the time of his taking said oath, was at open war with the other; and that the said Legarda violated two of such oaths within a period of eight months, and in each instance fled direct to the armed enemy of the government to which he had formerly sworn allegiance.

9. That the said publication of the article complained of was made in the public press of the city of Manila, not maliciously, but for the sole and only purpose of showing to the people of the Philippine Islands and of the United States the character of said Legarda and his total unfitness for the official position he was then, and is now, occupying.

As the reading was about finished Attorney Calderon again entered a protest. However, the reading of the paper was finished. Mr. Montagne then arose and was preparing to read the Spanish transla-

tion when the prosecution announced that they waived the reading of the Spanish. Both papers were made part of the records of the case.

His honor asked if all the testimony was in. Both sides answered in the affirmative. Next Friday afternoon at 3:00 o'clock was the time set for arguing the case.

On May 23, 1902, suit was brought against plaintiffs in error, on the headlines only. The complaint was as follows:

> The undersigned accuses Fred L. Dorr and Ed. F. O'Brien of the crime of libel, committed as follows: That on the 16th day of April, 1902, in the city of Manila, the said Fred L. Dorr and Ed. F. O'Brien, pretending to make a report of the proceedings had in a trial pending before this court, in which Don Benito Legarda was plaintiff and Don Vicente G. Valdes was defendant, the said Don Benito Legarda having testified as a witness therein, willfully and maliciously and with intent to injure the said Don Benito Legarda, published with respect to the said Don Benito Legarda, in the English language, a false and malicious libel, which libel is of the following tenor:
>
> "Traitor, Seducer, and Perjurer."
>
> Sensational allegations against Commissioner Legarda.
>
> Made of record and read in English—Spanish reading waived.
>
> "Wife would have killed him."

Thereby meaning and giving to understand that the said Don Benito Legarda was a traitor, seducer, and perjurer, and that he had committed the crimes of seduction, treason, and perjury, and that therefore his wife desired to kill him; and below the said libelous publication appears the following:

"Legarda pale and nervous."

Thereby meaning that he became so in consequence of the truth of the accusations referred to, it being the purpose of the accused to thus give an appearance of probability to the said libel, against the statute in the case made and provided.

(Signed) DIONISIO CHANCO,
Assistant Prosecuting Attorney.

The case went to trial on August 25, 1902. It is proper to say in this connection that the Philippine Commission, as soon as the defects in the Spanish libel law were called to its attention, passed act No. 277, incorporating into the law of the Philippines the principles of the law of libel as they are found in most of the States of the Union. It repealed the Spanish law making truth no defense. *So, whilst Valdez was tried under the old Spanish law, plantiffs in error were prosecuted under said act of the Commission and were given ample opportunity to prove the truth of the statements contained in the publication complained of.* After a fair and impartial trial, they were found guilty and sentenced to six months' imprisonment at

hard labor, and to pay a fine of $1,000 United States currency. The supreme court of the islands, on appeal, affirmed the judgment of the lower court. The case is here on writ of error. Plaintiffs in error set out five assignments of error, which we think may be fairly stated in three propositions:

First. That the court erred in holding that said headlines or caption declared upon were not a legitimate deduction from a privileged publication of an exact and truthful account of a public judicial proceeding in a court of record;

Second. That the court erred in holding that these defendants were not entitled to a trial by an impartial jury, as provided in Article III, section 2, Amendment VI of the Constitution of the United States;

Third. That the court erred in holding that act No. 277, passed by the United States Philippine Commission (known as the libel law), is a valid law passed by competent legislative authority.

The above propositions are stated in the order of their importance and not as they appear in the assignment of errors. We shall discuss them in the above order.

FIRST ASSIGNMENT OF ERROR.

The single question raised here is: Were the headlines in question privileged?

There was no evidence introduced at the trial which showed, or tended to show, that the statements contained in the headlines were true. The trial court, in sentencing the plaintiffs in error, used the following language:

> *In the progress of this cause, not a witness was called or a question asked, nor was any suggestion made by counsel even hinting at the truth of any statements contained in the libelous publications, and I find that every word and every sentence contained in this libelous publication derogatory to Benito Legarda is false and wanton.*

The statements contained in the headlines being untrue, the law presumes malice; hence they constitute a libelous publication.

In view of this fact the only possible defense for plaintiffs in error is the contention that said headlines or caption were a legitimate deduction from a privileged publication of an exact and truthful account of a judicial proceeding in a court of record.

Our answer to this contention is:

I. That the body of the article itself was not privileged;

II. That, granting, for the sake of the argument, that the article was privileged, still plaintiffs in error are liable, because—

(*a*) The publication complained of constituted remarks or comments within the purview of sec. 8 of act No. 277.

(*b*) They were not a fair index to the contents of the article.

(*c*) Their publication was malicious.

I.

THE ARTICLE OVER WHICH THE HEADLINES IN QUESTION APPEARED WAS NOT PRIVILEGED.

It appears, from the language contained in the opinion of the court and in the dissenting opinion, that the judges of the supreme court of the Philippine Islands were of the impression that the Government by basing this prosecution upon the headlines thereby admitted that the body of the article was privileged. We think no such deduction can fairly be made. The Government has never made any such admission. The case was based upon the headlines because, in addition to containing the essence of all the damaging statements found in the article, they were, in respect to form totally, and in respect to substance partly, a product of the editor of the paper, and hence could not be considered privileged as being part of a court proceeding. We do not believe the article itself is entitled to privilege, notwithstanding the fact that the judge allowed the statements to be read in open court and made part of the record. The so-called "offer to prove" was, in reality a harangue, delivered in open court by an interloper,

in a case in which the statements contained therein could have no possible effect in determining the issues under consideration. Mr. Lamme was not a member of the bar and, under the Spanish law then in force in the islands, his very appearance in court as an attorney, without license, was a criminal offense. The "offer" was not in the form of evidence and was not tendered as such. No witness was on the stand; no one had been produced in court who stood ready to testify to the truth of the statements made by Mr. Lamme; the performance was nothing more nor less than the delivery, in a dramatic way, of a stump speech made up of false statements which were irrelevant, immaterial, and in no way connected with the case on trial, and which, even if proven to be true, could not, under the law then in force, have been considered by the court in deciding the case. The author of the statement was not only guilty of a crime by appearing in the case as an attorney when he was not such in the eye of the law, but he was also unquestionably guilty of the crime of uttering and publishing a malicious libel against Benito Legarda. As stated before, the language of the so-called "offer to prove" was far more damaging than the libel published by Valdés in the "Miau," for which he was then being tried, because it contained more specific charges and a palpable attempt at ridicule.

The spectacle thus presented is that of one violating a criminal law, first, by appearing in court

as an attorney, without license, and, second, by uttering a malicious libel in a case where the statements contained therein were irrelevant, immaterial, and, in all respects, extraneous to the issues under consideration.

These facts were known to the plaintiffs in error, who published said article, as well as to the court and to Mr. Lamme.

In view of the foregoing, can it be said that it was possible for the presiding judge who permitted these crimes to be committed in his presence to make the so-called "offer to prove" a part of "judicial proceedings" in a legal sense, by allowing it to be read in court and incorporated into the record?

We do not think this proposition can be maintained. It will be observed in this case that the utterance complained of was *wholly foreign* to the cause under consideration. For this reason it was libelous and subjected the author of it to criminal prosecution. The rule in England is that judges, parties, counsel, and witnesses, are absolutely exempted from liability to an action for defamatory words uttered in the course of judicial proceedings. In the United States this doctrine is qualified by requiring the statements made in the course of the trial to be *pertinent and material to the case*. This qualification of the English rule is adopted in order that the protection given to individuals in the interest of an efficient administration of justice

may not be used as a cloak from beneath which to gratify private malice.

In the case of *Stackpole* v. *Hennen* (17 Am. Dec., 187), counsel was accused of using the following language in putting certain questions to witness: "I wish to show that the witness is perjured, and that he came here to perjure himself."

The court held that the language was not privileged, and a judgment for the plaintiff was upheld. In the course of the decision it was stated:

> The proposition that any class of men, under the pretense of aiding in the administration of justice, could say what they pleased of every individual who was a witness or party, without incurring responsibility, is too revolting to require refutation. Equally unfounded do we believe a ground assumed in the defense of the present case, that counsel is not responsible even for speaking maliciously, if the matter was spoken during the trial and relative to the cause in hand.

The rule is well settled in the United States that irrelevant and impertinent statements, made in the progress of a trial, render the author of them liable to a criminal prosecution. If the statements had any bearing upon the question before the court, and the question of the admissibility of the testimony was one susceptible of discussion, then the ruling of the court would be final in determining whether the article was privileged within the meaning of the law. But we do not believe a

purely gratuitous statement in open court, which can have no application to the case on trial, and which is palpably false and damaging, can be brought within the limits of privilege merely by the action of the court in allowing it to be read and made a part of the record.

The crucial question is: *Was the utterance pertinent to the issues under consideration by the court?* It will be observed that, in proceedings in court, statements made by counsel do not become libelous by reason of being false and damaging, but by reason of the fact that they have no bearing upon the case on trial. It is this lack of the element of pertinency which subjects the counsel who utters them to criminal prosecution. Of course, it is the duty of the court to keep out all such matters, but if, through the stupidity, corruption, collusion, inadvertence or mistake of the court, false and damaging statements which are wholly foreign to the subject-matter under consideration get into the record, this does not furnish immunity from prosecution to newspapers who afterwards publish them. If this were not so, there could be no more convenient and effective way of destroying reputations than by injecting into the trial of a case libelous matter, with a view to having it spread broadcast throughout the community by the public press acting under the protection of the privilege afforded by the law.

Generally speaking, statements of counsel, other than questions put to witnesses and objections to

rulings of the court, have no proper place in court records. The court record, strictly speaking, consists of the pleadings, the questions of counsel, the answers of witnesses, objections by counsel, and the rulings and judgment of the court. In no proper or legal sense can the statements of counsel in regard to extraneous matters which have no bearing upon the case at trial be said to form a part of the record of the court.

In *Commonwealth* v. *Godschalk* (13 Phil. (Pa.), 575), the *court held that a speech of counsel in judicial proceedings does not afford matter for a privileged publication, and if it contains scandalous and defamatory matter a prosecution for libel will be maintained.*

It will be said in reply to this that such a rule would work a hardship upon the public press. At first blush this contention would seem to be well founded, but upon closer examination it will be seen that the rule is not an unfair one. When counsel in open court enters upon a policy of uttering defamatory and injurious statements in regard to an individual, the question, under the rule here sought to be established, would immediately arise: Are such statements material to the issue? If wholly extraneous to the subject-matter before the court, the representative of the press is presumed to know that under the law counsel is guilty of uttering a criminal libel, and hence he is immediately put upon notice. In order to make certain that he is safe in publishing the proceedings he

should wait until the court passes upon the pertinency and relevancy of the utterances in question. If the court decides that the utterances naturally grow out of and form a part of the controversy in question, and naturally and properly form a part of the proceedings, then the statements may be reproduced in the press under the privilege that it was court proceedings.

This rule can not possibly work a hardship in the case at bar, because all parties in interest had full knowledge of the law in force and had full knowledge of the fact that the so-called "offer to prove" of Mr. Lamme could not possibly have any bearing upon the determination of the guilt or innocence of Valdés. The truth is, a careful study of the record produces irresistibly the conviction that there was collusion on the part of all the responsible parties connected with this publication.

II.

THE HEADLINES IN QUESTION WERE LIBELOUS, BECAUSE—

(*a*) **They were "remarks or comments" within the meaning of the law;**

(*b*) **They were not a fair "epitome or index" to the article itself;**

(*c*) **Their publication was malicious.**

(a) *The headlines in question were libelous, because they were "remarks or comments" within the meaning of the law.*

The libel law now in force in the Philippine Islands, relating to newspaper accounts of judicial

proceedings, is found in sections 7 and 8 of act No. 277, as follows:

> SEC. 7. No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceeding, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.
>
> SEC. 8. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected.

The question here raised is: Are the headlines of this article "remarks or comments" within the scope of said section 8?

In some of the States of the Union the publication of headlines in connection with privileged matter does not confer on the headlines themselves any privilege. This is true in New York,[a] and the section above referred to is broader than the New York statute, including as it does "remarks and comments" of every character. The provisions of this section limit the newspapers to the publication of a bare account of court proceedings. Of course they may put headlines to such accounts if

[a] The last section does not apply to a libel contained in the heading of the report, or in any other matter added by any person concerned in the publication, or in the report of anything said or done at the time and place of the public and official proceedings, which was not a part thereof. (Rev. Stats., New York, 2d ed., Vol. II, p. 1875, par. 2.)

they choose, but if, in so doing, they publish defamatory statements, or words which tend to impeach the honesty, virtue, or integrity of an individual, and thereby expose him to public contempt or ridicule, the offense is as complete as if it were a separate and independent publication.

It does not require argument to establish the defamatory character of the headlines in question. It is difficult to conceive of words more damaging than those used in this caption. Are they, within the meaning of the law, "remarks or comments?"

A comment, according to the Century Dictionary, is:

> A spoken or written remark or conversation; a remark or note; especially, a written note intended as a criticism, explanation, or expansion of a passage in a book or other writing; annotation, explanation, exposition.

The Standard Dictionary defines "remark" to be:

> A *comment or saying*, whether oral or written; especially one that is *brief and pertinent and made without much premeditation*.

According to Webster, a comment is:

> A remark, observation, or criticism; gossip, discourse, talk; *a note or observation intended to explain*, illustrate, or criticise *the meaning of a writing*, book, etc. Explanation, annotation, exposition.

The same author defines a remark to be:

> An expression in speech or writing of something remarked or noticed. *The mention of that which is worthy of attention or notice.* A casual observation, comment, or statement.

In order to violate section 8 of the law, it is not necessary that the newspaper shall publish a serious discussion, in the form of an editorial, of what took place at a trial. It is sufficient if a note of explanation or comment, "brief and pertinent and made without much premeditation," is published. There is no doubt that headlines may be used for making comments as well as any other portion of the paper. The use of headlines is, possibly, the most destructive and damaging form of remarks and comments known to the newspaper profession. The art of compressing a great deal into a small compass and stating it in a sensational, pithy, catchy form, in large type, at the head of an article is highly developed in this country. Possibly in no other line in the field of journalism has there been so much progress made in recent years. The tendency is strongly toward sensationalism, the object being, by the use of highly colored, pithy headlines, to catch the attention of the busy public.

Plaintiffs in error contend that these headlines are a mere deduction from the contents of the article, which they claim is privileged. This contention, if true, would be an argument against

their position. Deductions, or inferences, are clearly prohibited by the law. These are stronger terms than "comments" or "remarks." When editors undertake to publish their own deductions or inferences from what took place at a trial, the privilege ceases.

According to Webster, a deduction is:

> That which is deduced, or drawn from, premises by a process of reasoning; inference, acquisition.

If this contention of plaintiffs in error should prevail, it would have the effect of destroying the rule laid down in section 8.

It is held in some States where there is no law with reference to comments and remarks that headlines may be used if they fairly and accurately forecast the article published, but they must be true and faithful epitomes of what is contained in the account of the court proceedings.

In the case of *Lawyers' Cooperative Publishing Co.* v. *West Publishing Co.* (32 N. Y., 585), the court held that—

> Defamatory headlines prefixed to a report of a judicial decision or of judicial proceedings are no part of the report, but are, in effect, comments upon it and are not privileged unless they are a fair index of the matter contained in a truthful report.

In the case of *Hayes* v. *Press Company, Limited* (127 Pa., 642), the suit was brought on the headlines of the following publication:

Hotel proprietors embarrassed.

A judgment was entered yesterday by the Third National Bank against J. F. and W. N. Hayes, of the St. George Hotel, on a promissory note, dated August 6th, and payable on demand, for fifteen hundred dollars.

The court, in holding that the publication was libelous, laid down the following doctrine:

In his answer to the fourth point, above quoted, the learned judge said: "I have defined in my charge how far it is privileged, by telling you that a fair comment was admissible, but that an unfair and reckless comment was not admissible. This would take away the privilege." This answer, we think, was misleading and erroneous. Strictly speaking, the question of privilege was not involved. It was the common right of anyone to publish the fact that a judgment for $1,500 had been entered against the defendants, substantially as shown by the record of the court in which it was entered; but it was neither the right nor the privilege of defendant, or anyone else, to publish in connection therewith the declaration, in the form of a headline, or otherwise, that the defendants in the judgment were embarrassed. That had a direct tendency to impair their credit and injure their business; and if the evidence is believed, it

did injure plaintiff's credit and business as a hotel keeper. Such a declaration, whether it be regarded as an inference drawn by the writer from the fact that the judgment was entered, or be called a comment on a judicial proceeding, was an unwarranted [illegible] tion of fact, which, if untrue, was manifestly calculated to impair plaintiff's credit and injure his business. It does not follow that one who authorizes a confession of judgment against himself is financially embarrassed. The publication, as a whole, including the headline, was in no sense privileged.

(b) *The headlines in question were libelous because they were not a fair "epitome or index" to the article itself.*

The main argument of plaintiffs in error, as we understand it, is based upon the proposition that the headlines in question are a fair index to the article, which is claimed to be an accurate account of what transpired in court. They deny that they are "remarks or comments" in any proper sense.

Assuming, for the sake of the argument, that plaintiffs in error are correct in this and that they had a right to place a fair "index" or "epitome" at the head of the article in the form of headlines, let us examine the language contained in the headlines, in connection with the article itself, for the purpose of ascertaining whether they contain an accurate summary of what took place in court, as stated in the published account.

An examination of the record in this case discloses that, according to the account contained in the Freedom, two events occurred at the trial which stood out prominent above all others.

First. The court ruled out all questions which tended to prove the truth of the allegations contained in the libel;

Second. Mr. Lamme read a statement in which he repeated the language contained in the article published in the "Miau" and stated that he stood ready to prove the same.

The headlines contain an account of only one of these events, namely, the one damaging to Legarda. They make no reference to the first and most important feature, which stood out through the entire trial of the case, that the court, under the law, ruled out all tenders of proof bearing on the truth of the statements contained in the libel. The second fact, that Mr. Lamme made these sensational statements, is brought out with great fulness and care, and in order to make it effective the editor attached a statement which was purely an inference of his own and which had no fact to support it.

A casual reading of these headlines would give the impression that a trial was in progress during which Legarda was charged, under the forms of law, in such a proper and legal manner as to entitle it to be made of record, with being a traitor, a seducer, and a perjurer, and that the result of these charges upon Legarda himself was to make

him pale and nervous. *As a matter of fact, Legarda was not present in court when the allegations were read by Mr. Lamme; hence this portion of the account is not only misleading, but false.* I think we might, in fairness, go further and state that one would naturally get the impression from reading these headlines that a witness had been placed on the stand and had testified to the foregoing statements, because this is the usual, and in fact the only, way in which charges of this kind are made in the progress of a trial and incorporated into the record. If the headlines had indicated that the allegations were merely an "offer to prove" on the part of counsel, and that the court ruled that such proof was inadmissible under the law, the statement would have been fair and accurate.

On pages 27 and 28 of the record will be found questions which indicate that Mr. Lamme undertook to prove facts for the purpose of leading up to prove the truth of the libel. In the opinion of the court, page 35 of the record, will also be found the following language:

> The judge of the court of first instance excluded the proof tendered in the document.

This fact does not appear in the headlines.

Newell on Defamation, Libel, and Slander, pages 556, 557, says:

> The publisher must add nothing of his own. He must not state his opinion of

> the conduct of the parties, or impute motives therefor; he must not insinuate that a particular witness committed perjury. That is not a report of what occurred; it is simply his comment on what occurred, and to this no privilege attaches. Often such comments may be justified on another ground—that they are fair and *bona fide* criticism on a matter of public interest, and are therefore not libelous. But such observations, to which quite different considerations apply, should not be mixed up with the history of the case. Lord Campbell said: "If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in court, and the two things—report and comment—should be kept separate." *And all sensational headings to reports should be avoided.*

See also *Andrews* v. *Chapman* (3 C. & K., 288).

Again, on page 559, Newell says:

> But if anything be omitted in the report which could make any appreciable difference in the plaintiff's favor, or anything erroneously inserted which could conceivably tell against him, then it is a question for the jury whether such deviation from absolute accuracy makes the report unfair; and the trial judge will not direct a verdict for either party.

And again, on the same page:

> If, however, there is a substantial misstatement of any material fact, and such

misstatement is prejudicial to the reputation of the plaintiff, then the report is unfair and inaccurate, and the jury will find for the plaintiff.

Our contention is that this caption is unfair and inaccurate, in that it gives an account of only one phase of what occurred at the trial, and that in language highly colored, sensational, and misleading.

The headlines give the impression that the effect of the proceedings in court was altogether damaging to Legarda's case. The truth is, nothing transpired that affected his case at all. The occurrences at the trial were of little consequence, for the reason that everyone present understood that Mr. Lamme's spectacular performance was a mere bluff, because, in the first place, he did not stand ready to prove any of his statements, no witness being present for that purpose; and, in the second place, for the reason that the court had ruled that any such proof, if it actually existed, would not be admitted as evidence.

(c) *The headlines in question were libelous, because they were published with malice.*

The law on this phase of the case is found in section 7 of act No. 277, which provides that fair and truthful reports of judicial proceedings are privileged, "except upon proof of malice in making such report, which shall not be implied from the mere fact of publication."

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If it can be demonstrated that the publication was maliciously made, it will result in eliminating all the foregoing arguments and very much simplify the issues in the case.

The contention of the Government that the headlines in question were published with malice is based upon the following facts:

1. The sensational form and undue prominence given them.

2. They are an unfair and inaccurate index to the contents of the article itself, summarizing, as they do, only those facts contained in the article which are prejudicial to Legarda.

3. They contain a statement in regard to Legarda's attitude at the trial which was not only damaging but absolutely false.

It will be conceded that malice can be shown by the form of the publication, as well as by the substance. A comparatively insignificant occurrence can be swelled into a matter of great importance by an angry editor, through the use of prominent and sensational headlines.

That this trial was a matter of interest to the people of Manila will not be questioned, but it is denied that it was of sufficient importance to warrant the prominence given it in the newspaper by the plaintiffs in error.

The size of the heading, in the first place, is out of all proportion with the importance of the occurrence, and when this is coupled with the fact that all the vicious part of the article was con-

densed into a few words and placed in the most damaging form conceivable, it goes far to show malice. It is certain that it is inconsistent with the spirit of disinterestedness and fair dealing. This presumption is materially strengthened when considered in connection with the fact that the caption was a one-sided and unfair index to the article. This element of unfairness, according to the authorities, is strong evidence of malice. Newell, in his work on libel and slander, page 554, says:

> When a man publishes a portion only, when it is in his power to publish the whole, this fragmentary publication will be evidence of malice, if the part selected and published tell more against the plaintiff than a report of the whole trial would have done.
>
> * * * * *
>
> A condensed report might be published, if prepared faithfully and truthfully, but the suppression of parts of the testimony which would tend to qualify defamatory matter contained in the report would be evidence of malice and would destroy the privilege. (45 Hun. (N. Y.), 120.)

If anything further is needed to demonstrate, beyond peradventure, that the publication was a malicious one, it is found in the fact that the warped, distorted, and partial index was given a still more sensational aspect and a higher coloring by reason of the addition of a statement which was *totally untrue*.

The statement that Legarda was "pale and nervous" in connection with the reading of the so-called "offer to prove" was manifestly made for the purpose of giving the impression that the allegations contained in the libel were true, as evidenced by the effect they had on him when read in open court in his presence. This shows a wanton recklessness in the perversion of facts which argues conclusively the existence of malice. It will be remembered in this connection that in the trial of the case at bar plaintiffs in error had ample opportunity, with Mr. Lamme and Montagne & Dominguez as their counsel, to prove the truth of these allegations which they said they stood ready to prove in the "Miau" prosecution. They had months in which to prepare for the case; they contended all the time that they had proofs of the alleged facts in their possession. The production of these proofs would not only have been admissible, but it was the one thing which would have saved them from the humiliation of conviction and punishment; yet when they were put upon trial for publishing these statements, under a law which permitted the truth to be proved in justification, they did not produce a single witness or lift a finger in the direction of substantiating the charges by the introduction of actual proof. So complete was their failure in this regard as to warrant the court of first instance, in saying, when announcing its judgment:

I find that every word and every sentence contained in this libelous publication derogatory to Benito Legarda is false and wanton.

Let us examine the publication from another point of view. Let us begin by assuming that there was malice.

Suppose that Mr. Lamme and plaintiffs in error had a grievance against Legarda, and the presentation of the so-called "offer to prove" and its subsequent publication were the outcome of collusion between these parties. If the foregoing had been the facts, would it have been possible for the plaintiffs in error, in reproducing the occurrences which took place at the "Miau" prosecution, to have resorted to a publication more destructive in form and character than the one actually used? The sting of the article is put in three of the most destructive and damaging words in the English language, and placed in large display type at the very heading of the article. Had larger type been used, had greater space been covered by the headlines, had they gone further in making the headlines one-sided and prejudiced, had they added further falsehood, the malice would have been palpable to the public and their purpose would thus have been defeated.

Therefore, proceeding upon the assumption that plaintiffs in error were actuated by a spirit of hatred and revenge, they used the words and form best calculated to accomplish their malicious ends.

From whatever standpoint it is viewed, it is impossible to contemplate this proceeding in its entirety, especially when it is considered in the light of subsequent events, without being overwhelmed with the conviction that the conduct of the parties responsible for it was the result of improper motives, and that the publication was libelous because maliciously made.

We submit, therefore, that the cumulative effect of the foregoing facts in establishing malice can not be resisted.

It must be constantly borne in mind, in the consideration of this case, that Mr. Edwin H. Lamme and Montagne & Dominguez, who were the lawyers for Valdés in the "Miau" prosecution before Judge Odlin, were also the lawyers for plaintiffs in error in this prosecution before Judge Ambler; and that while Valdés was tried under the old Spanish law, under which truth was no defense, plaintiffs in error were tried under the new libel law, under which truth is a defense.

SECOND ASSIGNMENT OF ERROR.

Is the right of trial by jury in the Philippines?

The second assignment of error is based upon the proposition that the Constitution of the United States, in its entirety, has been in full force and effect in the Philippine Islands since the date of the ratification of the treaty of Paris, and hence

the provision guaranteeing the right of trial by jury has existed in the islands since that date.

This court has recently held in the so-called Insular Cases that exactly the contrary of the foregoing proposition is the law. It held in those cases that the provisions of the Constitution do not of their own force attach to newly acquired territory immediately upon the date of acquisition; that power to extend the provisions of the Constitution to the territories rests in Congress; that notwithstanding the fact that there are certain prohibitions contained in the Constitution relating to fundamental rights, which go to the very root of the power of Congress to act, at all times, in all places, and under all circumstances, yet there are other limitations contained in that instrument, not absolute in their nature, relating to such matters as methods of procedure and forms of judicial trials, which do not restrict Congress in the exercise of its power to create local governments and make needful rules and regulations for the Territories of the United States.

This position is identical with that taken by Chief Justice Marshall in the case of *American Insurance Co.* v. *Canter* (26 U. S. Rep., 542), and by Mr. Webster, who argued the case before him. In that case it will be observed that the "Great Chief Justice," without devoting any time to the discussion of the question of the source of the power, announced with great clearness and force

that the existence of such authority in Congress could not be questioned.[a]

In view of the foregoing decisions, the only practical question left for determination in cases like the one at bar is: What are those constitutional guarantees which Congress may, in its discretion, extend to or withhold from territory which has not been incorporated into the United States? Fortunately for the determination of this case the court has answered this question in the recent case of *Hawaii* v. *Mankichi*, as follows:

> We would even go further, and say that most, if not all, the privileges and immunities contained in the bill of rights of the

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[a] In the meantime, Florida continues to be a Territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the Territory, or other property, belonging to the United States."

Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.

* * * * *

These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. (26 U. S. Rep., 542, 543, 546.)

> Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case* are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well-being.

The power of Congress to provide such modes of trial and methods of procedure as, in its judgment, are best adapted to the needs of the people of the territory, is here clearly recognized. Such power was also recognized in the case of Rose, petitioner, 140 U. S., 453.

In the light of these decisions, it must be deemed that the proposition contained in the second assignment of error has been finally adjudicated, and we shall not consume the time of the court with further discussion of it.

THIRD ASSIGNMENT OF ERROR.

Is the Philippine Libel Law Valid?

The contention of plaintiffs in error that act No. 277 of the United States Philippine Commission is not a valid law, because it was not passed by competent legislative authority, is, in our opinion, not entitled to serious consideration.

*Common-law trial by jury and indictment by grand jury.

In passing said act the Commission acted either as a military commission or under the provisions of the so-called "Spooner amendment." If it is held that a state of war existed, there can be no dispute as to the authority of the Commission to pass the law in question, because its power to legislate was unrestricted save by the orders of the Commander in Chief of the Army. On the other hand, if it is held that a state of war did not exist in the Philippine Islands after the treaty of cession, then authority for the passage of the act in question is found in the provisions of the said "Spooner amendment."

The "Spooner amendment" was an act of Congress vesting in such persons as should be appointed by the President of the United States the power to legislate for the Philippine Islands, and providing that the acts and proceedings of such legislative body should be reported to Congress on or before the first day of each regular session. This was a provisional and temporary delegation of legislative power to a commission to be appointed by the President of the United States. There is no doubt about the general proposition of law that a branch of the Federal Government can not delegate its powers. It is also well settled that there are certain exceptions to the general rule. A well-known exception is that of municipal corporations, upon which the powers of legislation are commonly bestowed.

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The case in question forms an exception to the general rule equally well established. Congress, in the exercise of its power to make needful rules and regulations for the Territories, has often delegated its powers to the Territorial governments. The Supreme Court, in the case of *De Lima* v. *Bidwell*, says that the power to establish Territorial government has been too long exercised by Congress and acquiesced in by the Supreme Court to be deemed an unsettled question. (See also *Am. Ins. Co.* v. *Canter*, 1 Peters, 511.)

It is thus seen that there can be no doubt as to the validity of the law on the ground that the Commission did not possess competent legislative authority. Moreover, it will be remembered in this connection that when Congress did pass an act providing for the temporary government of the Philippine Islands, it formally ratified and affirmed the action of the President of the United States in creating the Philippine Commission and in authorizing said Commission to exercise the powers to the extent and in the manner and form in which it did, and ratified by implication all the acts of the Commission up to that date.

CONCLUSION.

We contend, therefore, that the decision of the supreme court of the Philippine Islands in this case should be affirmed, on the following grounds:

First. *That the headlines in question constituted a libelous publication, because*

(*a*) *The body of the article, which purported to be an account of court proceedings, was not privileged; hence no privilege could be claimed for said headlines on the ground that they formed a part of a privileged publication;*

(*b*) *Assuming, for the sake of the argument, that said account of court proceedings was privileged, the headlines complained of are not privileged, for the reason that they constitute "remarks or comments" within the meaning of section 8 of the libel law, which provides that libelous remarks or comments connected with matter privileged receive no privilege by reason of being so connected.*

(*c*) *Said headlines are not a fair index or epitome to the article itself, for the reason that they epitomize only that part of the contents of the article which was prejudicial to Legarda, and for the further reason that they contain a damaging statement which was absolutely false.*

(*d*) *Independently of the question whether the article itself was privileged, or whether*

the headlines were "remarks or comments" within the meaning of section 8 of act No. 277, said headlines were published with malice, as is evidenced by the undue prominence given to them, the damaging form in which they were arranged, the unfair and one-sided synopsis they give of the contents of the article itself, and the false and damaging statements contained therein.

Second. *The right of trial by jury does not exist in the Philippine Islands, because it has never been extended there by act of Congress, which, under the decisions of this court in the cases of Hawaii* v. *Mankichi, Ross, petitioner, American Ins. Co.* v. *Canter, and in the so-called insular cases, is the only authority by which this can be accomplished.*

Third. *That act No. 277, under which this prosecution was instituted, is a valid law, for the reason that it was passed by competent legislative authority, the United States Philippine Commission being a legislative body which operated as a military commission while war existed, and after peace was declared by virtue of authority vested in it by act of Congress, all its acts having received the implied ratification of Congress in the Philippine Government act of July 1, 1902.*

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